IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 230,

THE ST. LOUIS, KENNETT & SOUTHEASTERN RAILROAD COMPANY

vs.

THE UNITED STATES AND JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF APPELLANT.

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Statement of the Case.

This is an appeal from the Court of Claims sustaining a demurrer to the petition for the adjustment of losses sustained by the appellant during that portion of the period of Federal Control for the first six months of the year 1918, when the appellant was under the control of the Director

General of Railroads of the United States. An application had been made to the Interstate Commerce Commission for the settlement of the claim for the losses sustained by the appellant in the sum of $67,609.00, being the items set out in the complaint in Section 5 of the petition found on pages 4 and 5 of the Record.

Upon the petitions filed in the Court of Claims two hearings were had. At the first hearing the Court sustained a demurrer to the petition on the ground of lack of jurisdiction appearing in the allegations of the petition. No opinion was filed, but the Court entered the following memorandum:

> "The court's conclusion is based upon the considerations:
>
> "(1) That the jurisdiction of the Court of Claims in cases such as this is conferred by section 3 of the Federal Control Act, 40 Stat. 451. It provides for action by a board of referees and authorizes an agreement by the President with the carrier, and 'failing such agreement' suit may be brought to determine the amount of just compensation. In the suit thus authorized the report of the referees is *prima facie* evidence of the amount of compensation and of the facts stated therein. The facts averred in the petition fail to show that the condition precedent contemplated by the statute has been complied with so as to bring the case within the jurisdiction of this court.
>
> "(2) That if the court have jurisdiction, the agreement Exhibit A to the petition, concludes any rights the plaintiff might otherwise have."

In accordance with the rules of the Court an amended petition was filed complying as far as possible with the

suggestions of the Court in the memorandum. To this amended petition the defendants refiled their former demurrer. It appeared at the second hearing that the Court had sustained the first ground of demurrer at the former hearing because it was assumed by the Court that the order of the Board of Referees should have been referred to the Interstate Commerce Commission, and the appeal should be taken from the order of the Commission. When this, however, was corrected by introducing the statute showing that the appeal should be taken from the order of the Board of Referees, the Court directed the argument to proceed as to the meaning of the contract set out as an exhibit to the plaintiff's petitions. Upon the final argument at the second hearing the Court sustained the defendants' demurrer as shown by the order and judgment of the Court set out on page 11 of the Record. From this judgment sustaining the demurrer and dismissing the petition the plaintiff duly appealed, which appeal was by the Court allowed, as shown on page 11 of the Record.

The case was filed in this Court on December 3, 1923, and is here for consideration.

Assignment of Error.

The Court below erred in sustaining the defendants' demurrer to the plaintiff's amended petition, and in dismissing said petition from the Court.

The Issue Involved.

Under the ruling of the Court below no issue as to the four items of losses sustained by the plaintiff as alleged in Section 5 of the petition set out on pages 4 and 5 of the

Record, is now before the Court, but the sole issue is as to the meaning of the contract set out as Exhibit "A" to the petitions and found beginning on page 6 of the Record.

Is Section 3 of this contract a receipt in full for all losses and damages sustained by the plaintiff as alleged in Section 5 of its petition? Section 3 of the contract is a part of a contract executed by both parties to this action containing 13 sections beginning on page 6 and ending on page 9 of the Record.

It is the contention of the appellant that this contract must be considered as a whole, must be all construed together, and that it in nowise referred to or included any item of loss or damage sustained by the plaintiff below and set out in Section 5 of the petition, but that Section 3 refers to and includes only such items as are referred to in specific sections of the contract. This is the exact allegation made in the petition in reference to Section 3 of the contract, and which allegations on demurrer are assumed to be true, and should have been taken into consideration by the Court below, and a trial held upon the validity of such losses and damages.

On the contrary it is held by the defendants that Section 3 of the contract is a receipt in full for all losses and damages sustained during the period of Federal control by the railroad company, and that such waiver prevents the appellant from the recovery of its losses and damages so set out in its petition.

The sole question, then, before this Court is the meaning and effect of Section 3 of this contract which the Court held to be an acknowledgment of payment in full, or a waiver of the losses and damages for the items set out in Section 5 of the petition.

ARGUMENT.

I.

Jurisdiction of the Court Below.

It was alleged in the demurrer to the petition and to the amended petition that the Court below had no jurisdiction under the allegations contained. Anticipating that this claim may also be urged in this Court, some attention must be given to it, although the Court below at the second hearing overruled the first ground of demurrer, took jurisdiction of the case, and decided the demurrer on the ground that the petition did not allege facts sufficient to constitute a cause of action.

The jurisdiction of the Court below in this class of cases was conferred by the Federal Control Act of March 21, 1918, 40 Stat. 461, Paragraph 3115¾a, Compiled Statutes, 1918. Section 3 of this Act provides that claims against the Government growing out of the taking of the railroads for war purposes under the Act of August 29, 1916, 39 Stat. 645, might be settled by agreement between the President and the railroad company and payment might be made for such claims. This Section further provides that if the President or the Director General, to whom the power to make such agreement had been given, shall fail to agree with the railroad company upon the validity or the amount of such claims, a Board of Referees shall be appointed by the Interstate Commerce Commission, which Board should hear the claims and report its findings to the parties. The statute then specifically provides as follows:

> "Failing such agreement, either the United States or such carrier may file a petition in the Court of Claims for the purpose of determining the amount of such just compensation, and in the proceedings in said court the report of said referees shall be *prima facie* evidence of the amount of just compensation and of the facts therein stated. Proceedings in the Court of Claims under this section shall be given precedence and expedited in every practicable way."

The petition properly alleged the nature of the claims; that the Director General failed to agree with the plaintiff as to the amount due; that the Interstate Commerce Commission had appointed a Board of Referees before whom the claim was presented; that the Board of Referees filed a report thereon dated June 14, 1922, and that by virtue of this finding the plaintiff filed its petition in the Court of Claims. No objection was made in the demurrer that all material allegations were not included in the petition, but it was alleged by the defendants that under the statute above quoted the Court had no jurisdiction of the subject matter of the claim because the Board of Referees failed to find any amount due the plaintiff.

It appeared from the argument of counsel for the defendants in support of this ground of the demurrer that if the Board of Referees had found any amount whatever due the plaintiff, then either party, or in fact both parties, might appeal to the Court of Claims for a hearing upon the report filed with the parties and upon the original claim filed before the Director General.

The Court below, however, it was learned at the second hearing, took the view that the report of the Board of Ref-

erees should have been filed with the Interstate Commerce Commission, and the appeal taken from the refusal of the Commission to allow the claim. This, however, was not the statute, and it appeared at the second hearing that the first ground of the demurrer was not well taken. It was then assumed by the Court that whatever the finding of the Board of Referees might be, either party dissatisfied with such report might file their petition in the Court of Claims and demand a hearing thereon. The Court below did not take the view expressed by counsel for the defendants that if the Board of Referees found nothing due, that no appeal would lie to the Court of Claims. The Court did not take the view that if the Referees found a million dollars due the plaintiff, the Director General might appeal, but if the Board of Referees found that nothing was due, then no appeal would lie under the same statute.

All of this, however, was corrected by the Court in taking jurisdiction of the case and sustaining the demurrer at the second hearing referred to. The statute is so plain that no further discussion need be entered into as to the jurisdiction of the Court below.

II.

Admissions on Demurrer.

It will be noticed by the Court that the claim under consideration was not within or growing out of the contract which was set out as an exhibit to the petition in the Court below. The claim is specifically set out in Section 5 of the petition beginning at the bottom of page 4 of the Record, and includes four items of loss and damage which it was alleged by the appellant should be settled by the Director General and about which no agreement was reached.

On page 5 of the Record it is alleged that the plaintiff sustained a loss during the period of Federal Control because of deficit in operating expenses in the sum of $12,065.00.

It is further alleged that there was a loss during the period of Federal Control because it was not provided with proper maintenance of the ways and structures in the sum of $6,800.00.

It is further alleged that there was a further loss by not furnishing the necessary supplies and materials used in the operation of the railroad during said period in the sum of $1,944.00.

It is alleged that there was a further loss in refusing all compensation for the use of the railroad during said period in the sum of $46,800.00 all amounting to the sum of $67,609.00, for which demand is made because all payment was refused by the Director General.

The nature of the contract set out as an exhibit to the petition is described in Sections 1, 2, 3, and 4 of the petition beginning on page 2 of the Record, and after such description it is said in Section 4 of the petition, repeated on page 4 of the Record, that

> "No other or further consideration of any kind or nature whatsoever was included in said contract so drawn and required by the Director General, and no other or further receipt or acknowledgment of any consideration whatsoever was included therein or was intended by either party thereto. The plaintiff gained nothing by the execution of this contract, and by it no rights were lost."

It is thus shown that this action did not arise out of the contract or because of anything contained in it, but the

contract was set out as an exhibit to the petition not as a part thereof, but merely for the purpose of showing to the Court that the cause of action set out in the petition, and the items of losses and damages set out in Section 5 thereof, were entirely independent of and arose outside of the contract itself, and to show to the Court that no provision contained in the contract referred to any of these losses or damages, and that Section 3 did not and could not apply to these losses and damages, and that the demurrer admitted that there was no consideration covering these losses and damages included in or even remotely referred to by Section 3 of the contract.

Upon the demurrer the Court overlooked the fact that the claim was founded upon losses and damages not included in the contract, and overlooked the fact that this allegation of the petition expressly averred that "no other or further receipt or acknowledgment of any consideration whatsoever was included therein or was intended by either party thereto." The demurrer admitted this fact, and the Court erred in applying to such a claim so specifically plead an allegation in an outside document which was made an exhibit to the petition for the sole purpose of showing that the claims sued on were not included within the contract. The Court below should have heard the testimony upon the claim sued on, and then if the defendants had been able to prove that the items in the claim had been at some time, and somehow, and for some amount, settled and paid for, then the Court might on final hearing have rendered judgment in favor of the defendants. But on the petition containing the allegations above set out the Court erred in applying a contract covering other

things and other items and which contract it is admitted by the demurrer did not include the items in suit and which were not referred to in any provision in the contract.

III.

The Nature of the Contract.

The contract which the Court below construed to be a settlement of the claims set out in the petition contains thirteen sections beginning on page 6 of the Record. Sections 1 and 2 seem to allege that the railroad company was not taken under Federal control, not because it was different than other railroad companies, but simply because the Director General denied the application of the statute to this class of railroads. These sections, however, may pass out of the discussion because whatever view may have been somewhat laboriously expressed by the Director General when he drew this contract, nevertheless the decision of this Court in the case of the *Northern Pacific Railway Company et al. vs. North Dakota,* 250 U. S. 135, forever settled the question that these roads were taken under Federal control, and were subject to the Constitution and the laws made and in force under such conditions.

Section 3 of the contract contains the pretended waiver and receipt in full which the defendants claim bars the right of recovery in this case.

Section 4 contains some allegations about the war emergency and other similar conditions which have no application to the present issue.

Section 5 provides that all fares, rates, charges, and divisions which were in force on January 1, 1918, shall be maintained, and if any increases in the amounts received should

be granted the plaintiff should be allowed to participate therein.

Section 6 provides that the plaintiff shall receive an equitable allotment of cars and shall be allowed the same amount of free time for loading and unloading as was then in force, which was then the amount of two days for such purposes.

Section 7 provides that any difficulty arising between the parties might be referred to the Interstate Commerce Commission, and the decision shall be final and binding.

Section 8 provides that the plaintiff might have the privilege, if so desired, of purchasing supplies or maintaining repairs under the same conditions as allowed to other railroads.

Section 9 provides that no discriminations shall be made against the plaintiff in the matter of publishing tariffs and routing.

Section 10 provides that if the Director General should so determine, he should have the right to take into his own hands the possession, control, and operation of the railroad and the properties therein described.

Section 11 provides that relinquishment notice issued by the Director General on the 25th day of June, 1918, was rescinded and set aside as of the date when the same was issued, and that the said railroad and its properties were brought within these terms and under the control of the Federal Control Act. It further provides that the contract dated on the 26th day of February, 1919, should be made the same effect as if it had been executed and delivered on retroactive and be made effective as of April 1, 1918, with that date.

Section 12 refers only to the Director General making and formulating definite rules and regulations governing the ex-

change transportation, which rules shall be made applicable to the company without discrimination.

Section 13 provides that the company shall furnish the Director General with the usual reports required by the Interstate Commerce Commission, and such reports as might be required, but why any reports referred to in said section regarding the amount of freight handled by the company during the years 1915, 1916, 1917, and 1918, and the revenue therefrom which should have accrued to the company should be required, and why the amount of freight traffic which the company should claim was diverted during the period from April 1, 1918, to November 1, 1918, in view of the claim now set up as to the meaning of Section 3, is beyond all human comprehension. Why the Director General included these provisions in Section 13, if when he read Section 3 he knew that full settlement had been made for all losses and damages, is beyond human imagination.

If Section 3 was included in this contract for the purpose of showing a complete settlement for all losses and damages as now alleged by the demurrer and claimed by the Director General, why any or all sections of this contract should have been written excepting a receipt in full, is also beyond human comprehension.

IV.

The Date of the Contract.

The contract shows on its face that it was executed on the 26th day of February, 1919. In Section 11 it is stated that:

> "This contract shall become and be effective as of April 1, 1918, with the same effect as if it had been executed and delivered on said date."

Section 3 does not provide that it shall be retroactive, but it is stated as follows:

> "This is not intended to affect any claim said company may have against the United States for carrying the mails or for any other services rendered not pertaining to or based upon the Federal Control Act."

The contract in Section 1 (b) recognized the fact that the Federal Control Act was passed March 21, 1918.

Section 13 further provides that under certain conditions specifically named the plaintiff "shall receive in cash the difference between the total revenue on competitive freight traffic for the seven months' period of 1918," which seven months the section further says are "the period April 1, 1918, to November 1, 1918."

Section 13 further provides as follows:

> "In the event the company shall show that it has suffered from the diversion of competitive freight traffic between March 21, 1918, and April 1, 1918, it shall be reimbursed as provided herein."

These specific dates all set out in the contract show on their face that Section 3 was not intended by any possible construction to apply to any portion of the period between January 1 and April 1, 1918, and were specifically not to apply to the period from March 21 to April 1, 1918. These dates show that Section 3 cannot have the application given to it by the Director General or by the Court below. The significance of these dates will be further argued when the contract is more fully considered.

Under the most drastic construction of Section 3 made by the Director General the plaintiff is entitled to judgment on the several items set out in the petition for the period from January 1 to April 1, 1918.

V.

The Real Purposes of the Contract.

It is to be remembered that the railroads of the United States, including the plaintiff below, were taken under Federal control finally on January 1, 1918, for the purpose of aiding in the prosecution of the war then being waged. Of course, as they were taken for public use, the Fifth Amendment to the Constitution and all the laws then on the statute book and those which were subsequently passed in aid of this purpose, should all be applied. It is admitted in the pleadings that this railroad was taken under Federal control and that a notice of relinquishment from such control was issued by the Director General on June 25, 1918. This relinquishment notice the Director General has attempted to abrogate by Section 11 of the contract, and the notice of relinquishment in itself may have been entirely void because it was in violation of Section 1 of the Federal Control Act. But these matters may be entirely disregarded because the railroad company did upon receipt of the notice of relinquishment resume control and operation of its own railroad, and the further provisions of the Transportation Act of March 21, 1920, were applied so far as the same were applicable.

The Director General in his report to the 67th Congress, 4th Session, in House Document No. 546, on page 5, in regard to short-line railroads, says:

> "There are some 855 short-line railroads in the United States. The Railroad Administration did not take over the actual operation of these properties, and prior to June 30, 1918, they were formally relinquished from any question of constructive Federal control."

The question of actual control of these 855 short line railroads is no longer a matter of doubt, as the question has been settled by numerous decisions of the Interstate Commerce Commission and by a long line of settlements made to the different railroads in accordance with those decisions. The sole question, therefore, now to be considered is as to the liability of the Director General for the losses and damages and compensation set out in the petition of the plaintiff as affected by the different provisions of the contract, if the contract or any of its provisions can be applied to the claim set out in the petition.

In order to determine this question the whole contract must be taken into consideration. Sections 1, 2, and 11, of the contract indicate very plainly the doubt and uncertainty of the Director General when he drafted the contract as alleged in the petition and admitted by the demurrer. When the provisions of the different sections are all taken together, it is seen that the contract taken as a whole and construed by each of its different parts are drafted for the purpose of assuring the railroads of their rates, fares, and divisions, their equitable allotment of cars with two days free time for loading and unloading, and for the rights or privileges of the plaintiff to purchase supplies and repairs under the most favorable circumstances possible. These provisions did not give the railroad anything that it did not

then possess, but the contract was an assurance of the continued existence of those conditions during the time limits set out in the contract.

Section 3 of the contract then provided that for any of such assurances or privileges the plaintiff could not recover any losses or claims arising in law or equity against the Director General under the Federal Control Act.

The very statement of these provisions shows that no general language in Section 3 can be construed as a receipt in full or as a general waiver because the contract itself provides that Section 3 shall be in force only from and after April 1, 1918; that it shall not apply to any rights or claims prior to April 1, 1918, and specifically was "not intended to affect any claim said company may have against the United States for carrying the mails or for other services rendered not pertaining to or based upon the Federal Control Act."

Section 3 then begins only on April 1, and was not intended by its very terms to apply to the period between March 21 and April 1. The language of Section 3 then is so limited by Section 11 that it cannot apply to the cash payment specially provided for, and cannot apply to the 11 days between March 21 and April 1, 1918.

The whole amount of "full adjustment, settlement, satisfaction, and discharge of any and all claims and rights at law or in equity" mentioned in Section 3, must be the exact claims and rights which are mentioned in the later provisions of the contract, and to those only, and as the limitations of the contract as above set out are specifically mentioned this language of Section 3 cannot be applied to the

items of loss and damage and compensation sued on in the plaintiff's petition.

If Section 3 had been intended as a receipt in full for the losses and damages and compensation for the period between January 1 and June 25, 1918, then the receipt could not have been made to take effect and be enforced only after April 1, and could not have been prevented from applying after January 1, and to the 11 days between March 21, and April 1, 1918, and other items in Section 11 could not have been expressly exempted therefrom. This view of the whole contract is shown in the following testimony by the Government officials.

This view of section 3 is also borne out specifically and fully by the conduct of the Director General, and by his own words as publicly announced and made a matter of public record in the annual report of Mr. W. G. McAdoo in 1918, marked "Law" and "Confidential," under date of January 27, 1919, where at page 14 it is said:

> "At the time of relinquishment it was announced that a policy of co-operation with relinquished roads would be maintained, assuring fair divisions of joint rates, adequate car supply, and the preservation of routings so far as consistent with the national needs.
>
> "This policy finally, after hearings afforded the interested lines, ripened into a co-operative contract, which was announced on October 30, copy of which is appended. By its terms the order of relinquishment is recalled, the road is operated by its own officers, retaining its operating receipts, and paying its operating expenses, an equitable car allotment with a liberal per diem allowance is assured, the benefit of increased rates is extended to the contract-

ing road, the preservation of routing of competitive traffic is guaranteed in the same ratio as such traffic bore to the total traffic in the three years ending December 31, 1917, fair tariff publicity is given, and the advantage of unified purchasing under Federal control extended."

In testimony of Mr. Hines, the Director General, given on February 10, 1919, before the contract in issue was made, and printed in the public document entitled "Hearings before Subcommittee of House Committee on Appropriations," Sixty-fifth Congress, Third Session, it is said, beginning on pages 155 and 159:

"Mr. Hines: With respect to the short-line railroads which the President relinquished, and which therefore the Railroad Administration is not operating, we have not undertaken to control their conditions and betterments, and therefore have made no plans for furnishing money on that account or furnishing any other money for improvement purposes on those short lines, or for any other purposes except to the extent that we make certain operating readjustments with them which are not necessary to be taken into consideration for present purposes.

"The Chairman: But perhaps for the record it may be well to understand just what, if anything, has been done in the way of relationship with them in connection with operation to relieve the situation which they claimed would exist, and would be detrimental to them as a result of the Government taking control of the class 1 roads.

"Mr. Hines: We have made an arrangement whereby we will make co-operative contracts with the short-line railroads which were relinquished. Under those contracts we relieve them of the per diem on

freight cars which but for this arrangement they would owe the Railroad Administration for the use of such cars, and this release is to go back to March 21, the date of the Federal control act. We have also arranged to protect them for the future in the amount of competitive traffic, where there was competive traffic, equal to that which they enjoyed on an average during the test period; that is during the three years ending June 30, 1917, and we have also arranged to make with them a readjustment through a cash payment for competitive traffic which they may claim to have lost and the loss of which they may establish to our satisfaction from March 21, 1918, the date of the Federal control act, down to the date of the contract. These are what I spoke of as cash payments in connection with operating readjustments. I think the concessions thus made will reasonably protect these short lines against the difficulties which they have pointed out as being incident to their situation of not being included under Federal operation. * * *

"The Chairman: Is it more to the interest of the Government, leaving aside the interest the Government may have in preserving the credit and standing of these railroads generally, to make this arrangement, than to do the economic thing which your statement a few moments ago implied, of carrying traffic without regard to the fortunes of particular roads that were considered only by the class 1 roads, in order to prevent some other class 1 roads from getting competitive business?

"Mr. Hines: If we had not interest in the matter beyond the mere operation of the railroads actually under Federal operation, the natural thing to do would be not to make this allowance; but we are charged, as we look at it, with a measure of responsi-

> bility for the general situation, and we do not feel we could properly adopt a course which would result in so injuring these short-line railroads as to disable them to perform the public service for which local communities are dependent upon them. We feel, under the discretion vested in the President, that the roads could have been retained in complete Federal operation, and thereby the Government, in order to keep them adequately serving the public, would have assumed a very heavy responsibility for rentals. We feel the course we have adopted involves a much less burden on the Government and accomplishes the same public interest, and that therefore the power we have exercised is a lesser power included in the greater power that the act conferred."

In the testimony of Mr. Hines given on June 3, 1919, and found in the document entitled "Hearings before Subcommittee of House Committee on Appropriations," Sixty-sixth Congress, First Session, beginning on page 129, it is further said:

> "Mr. Hines: We have not paid them. You see the situation with the short-line companies is that we do not agree to pay them anything as compensation for the use of their property. There are two respects in which our agreements may involve the payment of money to them; one is, that we give them two days' free time on the use of cars; that is, to certain classes of short-line roads, and that will involve a money payment, and will depend on how many cars they take and how long they keep them. Another is that we agreed during Federal control to give them substantially the same amount of interchange traffic which they enjoyed during the test period, and it is contemplated that we will make some money settlement for that part of the past

period of Federal control, in the event the interchange traffic they enjoyed in that time fell short of what they would be entitled to under the contract, but that is a thing that would have to be worked out as to each company, and we have felt that we were not in position to make any estimate that would really be useful. It would be after all a surmise, and since the amounts involved would not be so large as to disturb the general character of the appropriation, it would be better to wait until we knew the exact facts.

"Mr. Slemp: Are the short-line roads making any serious claims for themselves in regard to compensation?

"Mr. Hines: Mr. Slemp, I will be glad to verify that. My present impression is that those claims have not taken definite shape.

"Mr. Slemp: No real difference has developed up to date between them and the Railroad Administration?

"Mr. Hines: Not that I am aware of, but I will verify that and advise you later."

In the testimony of Mr. Sherley, the Director of Finance, found in the public document entitled "Hearings before Subcommittee of House Committee on Appropriations," Sixty-sixth Congress, Second Session, on page 152, it is said:

"The Chairman: In arriving at the balance due on compensation have you taken into consideration the provisions of the transportation act with regard to the short lines?

"Mr. Sherley: No, sir; because the indebtedness of the short lines is not an indebtedness that we are not liable to pay, as the transportation act provides that any indebtedness due to the short lines shall be paid

> by the Secretary of the Treasury, and an indefinite appropriation is made for whatever sum may develop."

This testimony from the Director General of Railroads is not incompetent as varying the terms of a written contract, but goes to show what subjects were before the Director General and the officers of the plaintiff when the contract in question was written. It is always competent to show that the parties to a contract had no reference to a subject-matter which is not included within the contract. The testimony just quoted shows especially and fully that neither Mr. Hines nor Mr. Payne had the subjects sued on in section 5 of the petition before them when the contract was made, and as this is shown, then the subject-matter of such items cannot be included in section 3 of the contract, and that section 3 does not by any possible construction or intention refer even remotely to any of such items. It must be concluded, therefore, upon these points that section 3 of the contract by no possible construction can be made to apply to losses in operating expenses, maintenance of ways and structures, sufficient supplies and equipment, or to general compensation as provided by law.

Section 11 of the contract, found at page 9 of the record, is as follows:

> "In view of the foregoing covenants and agreements, and subject thereto, the order of relinquishment issued on the 29th day of June, 1918, is hereby rescinded and set aside as of the date when the same was issued; and the said railroad and the properties herein described are hereby brought fully within the terms and under the control of said Federal Control

Act, the same in all respects as if the said order of relinquishment had not been issued. This contract shall become effective as of April 1, 1918, with the same effect as if it had been executed and delivered on said date."

The purpose of this section cannot be considered an entire mystery. It was inserted by the Director General for some purpose. It cannot be construed separate and distinct and without a bearing upon any other section of the contract. It says that, "In view of the foregoing covenants and agreements and subject thereto," it provides that the relinquishment of the railroad from Federal Control on the 29th day of June, 1918, is set aside and the railroad is to be considered as having been under Federal Control all the time from its beginning on January 1st, 1918, to its end on March 31st, 1920. This section further provides that the contract itself instead of being made on the 26th day of February, 1919, was to be considered as having been made and put in effect on April 1st, 1918. All of these provisions having been written by the Director General must have some meaning and must somehow be given a rational construction if that be possible.

Now, what construction can be given to this Section 11 in connection with the other sections, and especially with Section 3?

If this Section 11 be given any force whatever, then it must mean that there was no relinquishment effected, that the railroad was under Federal Control the whole time in which Federal Control continued and that Section 3 cannot be considered as any receipt in full as claimed by the defense. There is no possible way for Section 3 to be considered as a

receipt in full for the unexpired period lasting from April 1st, 1918, to March 31st, 1920, and for losses unconsidered and without any possible estimate whatever.

If Section 11 is given any force whatever, then this contract provides for two years of Federal Control without estimating the losses or the damages to be paid under the Control Act by the Director General for that period of 2 years. Again, if Section 11 is given any force, then the railroad was under Federal Control for the first 3 months of the Federal Control period and Section 3 cannot then be considered as a settlement and a receipt in full for either the first 3 months before April 1st, 1918, or for the 2 years succeeding thereto.

Section 11 is just as binding as any other section of the contract, and it cannot be harmonized to any extent whatever with the view of Section 3 expressed by the defense in this case.

Section 3 cannot stand as a receipt in full or for any such purpose as is expressed in the defense, in view of Section 11, and yet Section 11 was drawn at the same time and in the same instrument as Section 3.

The simple fact remains that in view of Section 11, Section 3 is shown by the intrument itelf to be without any consideration whatever, and for no purpose can be considered as a settlement of the claim involved, and in view of Section 11, Section 3 furnishes no ground of defense.

The second paragraph of Section 13 reads as follows:

> "In the event the Company shall show that it has suffered from the diversion of competitive freight traffic between March 21, 1918, and April 1, 1918, it shall be reimbursed as provided herein."

When this paragraph is applied to Section 3 of the contract, it is shown that Section 3 was not intended by the Director General to contain a receipt in full as is now claimed in the defense. This paragraph specifically states that if the company shall suffer any loss between March 21 and April 1, 1918, "it shall be reimbursed as provided herein."

This shows on its face that Section 3 was not considered at the time the contract was drawn as a receipt in full as now claimed. This paragraph cannot be overlooked, it cannot be ignored, it does not make a new promise, but it does carry the meaning that there might be an unsettled account in favor of the plaintiff for the 11 days between the two dates above mentioned. When this is taken into consideration, then it is perfectly plain that Section 3 does not carry such a receipt as is claimed by the defense.

VI.

Trunk Line Contracts.

This view of the contract set out as an exhibit to the petition below is fully sustained by a consideration of the trunk line contracts made under the same law by the Director General at the same time and for the same purposes, which trunk line contract is set out fully beginning at page 39 of the Public Acts and Proclamations of the President relating to the United States Railroad Administration under date of December 31, 1918, where Section 5 is inserted providing for "upkeep" and where Section 7 is inserted providing for "compensation." Here it is specifically provided that for the trunk lines these items were within the contracts and due terms of settlement were used. This is fully shown in Sec-

tion 3 of the trunk line contracts, which particularly corresponds to Section 3 of the short line contracts, but it is significant that while Section 3 of the short line contract contains no reference to compensation or claims for losses and damages, as set out in the petition, yet under Section 3 of the trunk line contract in order to provide for the settlement of "upkeep" and "compensation," one significant clause is inserted in the terms of the acceptance, which clause reads as follows:

> "* * * for compensation under the Constitution and laws of the United States for the taking possession of its property, and for the use, control, and operation thereof during Federal control, and for any and all loss and damage to its business or traffic by reason of the diversion thereof or otherwise which has been or may be caused by said taking or by said possession, use, control, and operation."

Here in the trunk line contract the Director General and trunk line railroads considered "upkeep" and "compensation," and in the receipt provided it is shown that when fully settled the receipt should include these items.

If the Director General under the trunk line contracts was to provide for the payment of "upkeep" and "compensation," and agreed to do so, then on what ground the defendants can now say that the short line railroads, and especially the appellant, could be taken for public use and no losses or damages or compensation be paid for such use, and how can the demurrer be sustained as to the petition of the plaintiff?

The Constitution does not say that if the trunk lines shall be taken for the public use just compensation should be

made, but that if short line railroads are taken for the same use no compensation need be made. No such distinction has been made by Congress and no such distinction has been authorized by law.

VII.

The Consideration in the Contract.

It is not alleged nor now claimed that the contract was wholly and absolutely void because of total lack of consideration, or because the same was executed under forceable and legal duress. That great stress of conditions was in existence when the contract was drawn is not denied and is alleged in the petition, but the sole consideration running to the plaintiff was according to the allegations of the petition and in truth and in fact solely a continuation of the conditions then existing by law. The sole consideration, therefore, to which Section 3 can be applied was that no claim could be sustained in favor of the plaintiff for a violation of these provisions set out in Sections 5, 6, and 8 of the contract. The Director General gave nothing according to the allegations of the petition. He took everything for the period mentioned which the railroad possessed. The railroad agreed because of the continuance of the statutory rights in Sections 5, 6, and 8, that no claim would be allowed under these sections, but there is no more pretense for saying that Section 3 should prohibit the railroad from recovering for the losses and damages and compensation set out in the petition than for saying that a trunk line should be deprived of recovery for its corresponding losses, damages and compensation.

Section 9 of the contract provides that there shall be no discrimination against the company in regard to certain mat-

ters therein set out, but the Director General now proposes to exercise a harsh discrimination against this company and the other 117 short line railroads which signed similar contracts as against the rest of the 855 short line railroads and hundreds of trunk line railroads, all of which have been paid or are in process of being paid for their losses, damages and compensation. Why the Director General should exercise such discrimination against 218 railroads which signed a contract similar to the one in issue, is beyond explanation. No difference existed between the service rendered by the short line railroads which signed the contract and those which refused to sign the contract. Some 218 railroads are to be punished and the rest of the 855 short line railroads may go free and recover their claims by the law. There is no consideration moving toward the Director General which would deprive the plaintiff from its rights under the petition. It alleged that

> "no other or further consideration of any kind or nature whatsoever was intended in said contract so drawn and required by the Director General, and no other or further receipt or acknowledgment of any consideration whatsoever was included therein or was intended by either party thereto. The plaintiff gained nothing by the execution of the contract and by it no rights were lost."

VIII.

An Unfounded Position.

The claim of the defendants that no recovery can be had because of Section 3 of the contract is entirely unfounded. There is no language of the contract which would authorize

such a construction. Any such general language if taken separate and distinct from everything else would be open to construction by competent evidence, which evidence the Court denied the plaintiff when it was offered according to law. The other sections of the contract contain so many provisions and limitations wholly denying a general application of Section 3 to the claims set out in the petition, that Section 3 cannot be given the construction demanded by the defendants except in open defiance to all rules of law and to the other provisions of the contract themselves.

Section 3 then has no application to any time before April 1, 1918. It has no application to the 11 days between March 21 and April 1, 1918. It has no application to the cash payment provided for in Section 13. It has no application by its own terms to anything not based upon the Federal Control Act which took effect March 21, 1918.

Section 3, therefore, is so limited, is so constructed as a part of the whole contract, that to apply it as a receipt in full or as a general waiver of the claims for losses, damages and compensation set out in the petition, is not only unfounded, but is absurd. The position, therefore, that the language of Section 3 drawn as it was and for the purposes stated, drawn as a part of thirteen sections, and drawn in view of the language set out in Sections 1 and 2 and as a part of a contract executed on February 26, 1919, and attempted to be made retroactive beginning April 1, 1918, which was a legal impossibility, is not only unfounded and absurd, but is nothing less than untrustworthy. It is as illegal as it is unconscionable. We are not suing for an equitable right, but we are suing for a right guaranteed by the Constitution and based upon the Federal Control Act which was in itself not only

legal, but most equitable. How the defendants could settle similar claims of the trunk lines and of the rest of the short lines and then deny a similar settlement to about one-fourth of the total number of short lines who signed similar contracts, is a question which must be decided by the defendants themselves. Some reason must be given for this discrimination. The Court below rendered no reason and the defendants have indicated no reason excepting such as is conveyed by a misapplied construction of the language of Section 3. When this language is construed in the light of the contract itself, the position is rendered untenable.

IX.

Section 3 No Legal Waiver.

When Section 3 of the contract is fairly considered it will be found that there is no legal waiver contained in its provisions applying to the four items set out in the claim of the plaintiff.

The requisites of a legal waiver are easily ascertained.

A waiver is defined by the Supreme Court of the United States in the case of *Bennecke vs. Connecticut Mutual Life Insurance Co.*, 105 U. S., 355; 26 L., 990, as follows:

> "A waiver of a stipulation in an agreement must, to be effectual, not only be made intentionally, but with knowledge of the circumstances. This is the rule not only where there is a direct and precise agreement to waive the stipulation, but also where it is sought to deduce a waiver from the conduct of the party."

This definition has been approved so many times that it would be useless even to cite the cases where such approval has been made. A waiver is generally defined as "an intentional relinquishment of a known right." 28 Am. & Eng. Enc. of Law, 527; 40 Cyc., 252.

The allegations of the petition deny that there was any intention on the part of the plaintiff to waive any of its known rights, and allege that no waiver of such rights was ever made, and these allegations again are admitted by the demurrer and are in nowise in conflict with the language of the contract. Under this rule of law and under the allegations of the petition there is no ground for the claim that any waiver of any right to the recovery of any loss or compensation for the first six months of the Federal control period was ever made, and for this reason the demurrer should be overruled.

X.

The Contract of February 26, 1919 is Void on its Face.

The contract set out as Exhibit A of the petition cannot bar the plaintiff's right to recover for the items in suit, since it is absolutely null and void on its face. The said contract shows upon its face that the plaintiff was released from Federal Control on June 29, 1918. The contract further shows upon its face that it was executed on February 26, 1919, 8 months after the said relinquishment. The contract therefore shows that the Director General, getting all of his power from the Federal Control Act, had exercised all of that power in regard to that railroad and had released the same, which relinquishment had been accepted and

acted upon by the plaintiff railroad company on or by July 1, 1918. Therefore the Director General had no authority whatever to make any kind of a contract of the nature of the one in suit, nor could he secure such power or authority by an attempt to retake the railroad under Federal Control after the release therefrom had been issued by the Director General and accepted and acted upon by the plaintiff. The only thing that the Director General had legal power to do after the said date of relinquishment was to settle any claims that may have arisen under the law during the period of control, and as he has refused to settle he had no authority to act or even contract. The Director General today has as much power towards any or all roads taken under Federal Control as he had over the plaintiff road when this contract was executed.

XI.

Construction of War Statutes.

The Act of Congress authorizing the President to take control and possession of the railroads was a war measure which was followed by the Federal Control Act applying retroactively to settlement of all claims on behalf of the railroads beginning on January 1, 1918. This Court has recently had occasion to construe such statutes passed for the same general purposes and in the case of *Houston Coal Co. vs. The United States*, 262 U. S. 361, Mr. Justice McReynolds says:

> "The Lever Act was passed in view of the constitutional provision inhibiting the taking of private property for public use without just compensation. It vested the President with extraordinary powers

over the property of individuals which might be exercised through an agent at any place within the confines of the Union with many consequent hardships. As heretofore pointed out, *United States v. Pfitsch*, 256 U. S., 547, by deliberate purpose the different sections of the Act provide varying remedies for owners—some in the district courts and some in the Court of Claims.

"It reasonably may be assumed that Congress intended the remedy provided by each section should be adequate fairly to meet the exigencies consequent upon contemplated action thereunder and thus afford complete protection to the rights of owners. Considering this purpose and the attending circumstances, we think, Section 10 should be so construed as to give the district courts jurisdiction of those controversies which arise directly out of requisitions authorized by that section."

It has been heretofore fully discussed that Section 3 does not cover or apply to any of the items set out in the petition of the plaintiffs. It has also been shown that no payment has been made for the loss described in those items and no compensation was given to the plaintiff for the first six months of the Federal Control period. The limited consideration in the contract applied only to the sections of the contract specifically set out, and the petition specifically denies that any consideration whatsoever was given or intended to be given covering the waiver set out in Section 3, or authorized such waiver to be extended to the items set out in the petition of the plaintiff. This contract, while not wholly void for lack of consideration as to the conditions set out in Sections 5, 6 and 8 of the contract, yet the con-

tract is absolutely void when attempted to be applied to the items of loss and compensation set out in the petition. No consideration was paid by the Director General for the items so set out, and none was ever received by the plaintiff, and no such construction was ever intended to be applied by the Director General or by the plaintiff.

Under the law, then, as quoted above, and under the facts admitted to be true, Section 3 of the contract does not cover the items in suit, nor does it prevent the plaintiff from recovering thereon.

For these reasons the judgment of the Court of Claims in sustaining the demurrer and dismissing the petition should be reversed.

Respectfully submitted,

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